89-1354

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VERNON O. MAXWELL,
Petitioner,

v.

JAMES KENNETH GOODWIN AND EDDIE EARL HALLMAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 23, 1990

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QUESTION PRESENTED

When does a law enforcement officer's commission of the common law tort of malicious prosecution constitute a violation of 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDINGS BELOW

PLAINTIFFS

JAMES KENNETH GOODWIN
EDDIE EARL HALLMAN

DEFENDANTS

JAMES R. METTS,
individually and in his official capacity as Sheriff of Lexington County, South Carolina

VERNON O. MAXWELL,
individually and in his official capacity as a Lexington County Deputy Sheriff

JOHN T. VAUGHN,
individually and in his official capacity as a Lexington County Deputy Sheriff

RALPH BISHOP,
individually and d b a Bishop Salvage Company

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
BASIS FOR FEDERAL JURISDICTION AND RULE 14.1(i) STATEMENT	4
REASONS FOR GRANTING THE WRIT	4
I. SECTION 1983 LIABILITY SHOULD NOT BE BASED SOLELY UPON THE COMMISSION OF THE STATE LAW TORT OF MALICIOUS PROSECUTION	4
A. The Lack of a Coherent Uniform Federal Policy Regarding Wrongful Prosecution Under Section 1983 Has Produced Inconsistent Decisions Among The Federal Circuits	4
B. This Court's Attention Is Warranted by the Significant Federal Policies Present in This Case Regarding Section 1983 and Wrongful Prosecution	6

TABLE OF CONTENTS—Continued

Page

II. THIS COURT SHOULD REVIEW AND REVERSE THE FINDING OF THE COURT BELOW THAT SECTION 1983 LIABILITY EXISTS IN THE PRESENT CASE 8

CONCLUSION 10

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	Page
Baker v. McCollan, 443 U.S. 137 (1979)	4, 6
Barnier v. Szentmiklosi, 810 F.2d 594 (6th Cir. 1987)	7
Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985)	5
Cline v. Brusett, 661 F.2d 108 (9th Cir. 1981)	5
Conway v. Village of Mount Kisco, N.Y., 758 F.2d 46 (2nd Cir. 1985), *cert. granted sub nom. Cerbone v. Conway*, 474 U.S. 1100 (1986), *cert. dismissed*, 479 U.S. 84 (1986)	5
Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989), *reh'g denied* (Nov. 28, 1989)	1, 4, 6, 8, 9
Hand v. Gary, 838 F.2d 1420 (5th Cir. 1988)	5, 6
Inada v. Sullivan, 523 F.2d 485 (7th Cir. 1975)	6
Johnson v. Barker, 799 F.2d 1396 (9th Cir. 1986)	7
Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621 (9th Cir. 1988)	5
Losch v. Borough of Parkesburg, Pa., 736 F.2d 903 (3rd Cir. 1984)	6
Parratt v. Taylor, 451 U.S. 527 (1981)	7
Rochin v. People of California, 342 U.S. 165 (1952)	8
Singleton v. City of New York, 632 F.2d 185 (2nd Cir. 1980)	5
Usher v. City of Los Angeles, 828 F.2d 556 (9th Cir. 1987)	5

Constitution, Statutes and Regulations	
U.S. Const. amend. XIV	2
28 U.S.C. § 1254(1) (1982 & Supp. IV 1986)	2
28 U.S.C. § 1331 (1982 & Supp. IV 1986)	4
42 U.S.C. § 1983 (1982 & Supp. IV 1986)	*passim*
S.C. Code Ann. § 23-13-10 (Law. Co-op. 1976)	3

Miscellaneous	
S. Nahmod, *Civil Rights and Civil Liberties Litigation* (2d ed. 1986)	5, 7
W. Prosser and W. Keeton, *Law of Torts* (5th ed. 1984)	7

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JAMES KENNETH GOODWIN AND EDDIE EARL HALLMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Vernon O. Maxwell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on September 12, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 885 F.2d 157 and is reproduced in the Appendix at 1a to 18a. The opinion of the United States District Court for the District of South Carolina is unreported and appears in the Appendix at 19a to 35a.

JURISDICTION

The decision of the court of appeals was entered on September 12, 1989. On November 28, 1989, the court of appeals denied the Petition for Rehearing with Suggestion for Rehearing En Banc made on behalf of Peti-

tioner Maxwell. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are the fourteenth amendment to the Constitution of the United States and 42 U.S.C. § 1983. Each is set forth in pertinent part in the Appendix at 37a.

STATEMENT OF THE CASE

On the weekend of April 29, 1983, a robbery occurred in rural Lexington County, South Carolina, at the mobile home of Ralph Bishop, the employer of Respondents James Kenneth Goodwin and Eddie Earl Hallman. Following an investigation conducted by Petitioner Vernon O. Maxwell, Respondents were charged with grand larceny pursuant to a warrant issued after the statements of Bobby Johnson and Willie Nelson implicated Respondents in the robbery.

Respondents were subsequently indicted for grand larceny by the Lexington County Grand Jury. About a month before Respondents' trial, Michael Stafford was arrested in West Columbia, a city located in Lexington County. Stafford entered a confession with the Lexington County Solicitor as to series of break-ins at Bishop's mobile home.

After receiving a copy of the confession, Maxwell prepared reports clearing several robberies at the Bishop home, attributing them to Stafford. Although Maxwell testified it was an inadvertent clerical error, he also used the Stafford confession to clear the file for which Respondents ultimately stood trial. Maxwell's investigation had revealed that the crime for which Respondents were charged was accomplished without forcible entry. Stafford's confession, on the other hand, related only to several break-ins at the Bishop home.

Several days before trial, sheriff's deputies discovered that Nelson had provided them with a false name and address. Petitioner, however, was out of town and did not become aware of the problem with Nelson until the day of trial. Nelson was never located and did not testify at time of Respondents' trial. Following a jury trial in state court, Goodwin and Hallman were acquitted.

Thereafter, Respondents instituted this action by complaint dated April 21, 1986, alleging damages resulting from their arrests, indictments, and subsequent acquittals under a dozen different theories against Petitioner Maxwell; John T. Vaughn, Maxwell's partner; James R. Metts, the Lexington County Sheriff; and Bishop. Approximately half of the claims were disposed of at the summary judgment stage. Following trial, the district court directed a verdict for Vaughn and submitted four of the remaining causes of action to the jury: a federal claim for wrongful arrest in violation of 42 U.S.C. § 1983, a federal claim for wrongful prosecution in violation of 42 U.S.C. § 1983, a state claim for malicious prosecution, and a state claim for intentional infliction of emotional distress.

The jury returned a verdict for Bishop on all counts and for Maxwell and Metts on the wrongful arrest and intentional infliction of emotional distress counts. Verdicts for Respondents were returned against Maxwell on the wrongful prosecution and malicious prosecution counts. Sheriff Metts was found liable for Maxwell's malicious prosecution of Respondents on the basis of the sheriff's statute, S.C. Code Ann. § 23-13-10 (Law. Co-op. 1976), which makes all county sheriffs liable for the acts of their deputies. The jury awarded Sixty Thousand ($60,000.00) Dollars actual damages for Goodwin and Ninety Thousand ($90,000.00) Dollars actual damages for Hallman, against both Maxwell and Metts, and a total of One Hundred Seventy-Five Thousand ($175,000.00) Dollars punitive damages for both Respondents against Maxwell.

On appeal, the Fourth Circuit affirmed the actual damages awards for the malicious prosecution and the section 1983 claims, but reversed the punitive damages award on the grounds that no actual malice was proven at trial. *Goodwin v. Metts*, 885 F.2d 157, 166 (4th Cir. 1989), *reh'g denied*, (Nov. 28, 1989). By Order dated November 28, 1989, the court of appeals denied the Petitioner's request for rehearing and this Petition followed.

BASIS FOR FEDERAL JURISDICTION AND RULE 14.1(i) STATEMENT

The present action was initiated in the United States District Court for the District of South Carolina pursuant to 28 U.S.C. § 1331, alleging federal question claims under 42 U.S.C. § 1983 as well as pendent state claims.

REASONS FOR GRANTING THE WRIT

I. SECTION 1983 LIABILITY SHOULD NOT BE BASED SOLELY UPON THE COMMISSION OF THE STATE LAW TORT OF MALICIOUS PROSECUTION.

A. The Lack of a Coherent Uniform Federal Policy Regarding Wrongful Prosecution Under Section 1983 Has Produced Inconsistent Decisions Among Federal Circuits.

This Court has noted that section 1983 actions and state tort law claims are not coextensive. Writing for the Court, the then Justice Rehnquist explained, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principals." *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

Nevertheless, the courts of appeal have developed diverse theories for determining section 1983 liability in cases where defendants are alleged to have committed the tort of malicious prosecution.[1] In the Ninth Circuit, the general rule is that malicious prosecution does not constitute a deprivation of liberty without due process of law unless the prosecution was conducted with the intent to deprive a person of equal protection or other constitutional rights.[2] *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985); *Cline v. Brusett*, 661 F.2d 108, 112 (9th Cir. 1981). The Second Circuit, in at least one decision, basically required a *prima facie* showing of state tort liability for malicious prosecution before recognizing the possibility of a section 1983 claim. *Singleton v. City of New York*, 632 F.2d 185, 195 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920 (1981). The *Singleton* court went on to state that federal courts have generally adopted the common law rule that a prosecution must terminate in a plaintiff's favor as a prerequisite for a section 1983 claim. 632 F.2d at 195. *See also Conway v. Village of Mount Kisco, N.Y.*, 758 F.2d 46 (2nd Cir. 1985), *cert. granted sub nom. Cerbone v. Conway*, 474 U.S. 1100 (1986), *cert. dismissed*, 479 U.S. 84 (1986) (requiring proof of state tort liability plus a deprivation of sufficient constitutional magnitude to create a section 1983 claim).

On the other hand, once a plaintiff in the Fifth Circuit presents a *prima facie* state law malicious prosecution claim, the burden shifts to the defendant to show his conduct was not the product of improper motivation. *Hand*

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[1] For a fairly comprehensive listing of section 1983 cases discussing wrongful prosecution, see S. Nahmod, *Civil Rights and Civil Liberties Litigation* 154-56 (2d ed. 1986).

[2] In addition to demonstrating the existence of a state law claim for malicious prosecution, the Ninth Circuit requires a showing of actual intent to deprive a person of equal protection or other constitutional rights. *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988); *Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987).

v. Gary, 838 F.2d 1420, 1426 (5th Cir. 1988). However, a plaintiff need only show that charges were filed against him without probable cause and for reasons of personal animosity to state a section 1983 claim in the Third Circuit. *Losch v. Borough of Parkesburg, Pa.*, 736 F.2d 903, 907 (3rd Cir. 1984), (citing *Inada v. Sullivan*, 523 F.2d 485, 487-88 (7th Cir. 1975)).

In the present case, the jury found Maxwell liable for the state law claim of malicious prosecution. Apparently, the Fourth Circuit upheld section 1983 liability by reasoning that a constitutional deprivation had occurred attendant to the malicious prosecution. 885 F.2d at 163. In so doing, the Fourth Circuit assumed, as have other courts of appeal, that Respondents did not receive due process of law simply because they proved a state law claim of malicious prosecution.

B. This Court's Attention is Warranted by the Significant Federal Policies Present in This Case Regarding Section 1983 and Wrongful Prosecution.

With few exceptions, courts of appeal begin their section 1983 analysis in malicious prosecution cases by attempting to determine whether the elements of the state tort cause of action are present. Thus, in the lower federal courts these section 1983 inquiries begin with a state law analysis and often conclude with a deficient review of the necessary elements of any section 1983 claim.

An appropriate section 1983 analysis should focus upon whether a given prosecution was wrongful under the federal statute. The basic elements of a section 1983 claim were succinctly set forth in *Baker v. McCollan*. The plaintiff must show a constitutional deprivation, under color of state law, *without due process of law*. *See* 443 U.S. at 140.

For the most part, courts of appeal have had easy going in identifying a constitutional deprivation effected under color of state law. The due process element, how-

ever, has provided much consternation for many federal courts. Perhaps the most common error that courts have made is assuming that one who has been maliciously prosecuted has been denied due process. In fact, almost every individual who can prove a state law claim for malicious prosecution has received procedural due process. Traditional tort law principles provide that a criminal prosecution must have terminated in the plaintiff's favor as a prerequisite to recovery for malicious prosecution.[3] Thus, an element of the tort is that the plaintiff receive procedural due process in the form of an acquittal.

Federal courts presented with section 1983 claims based upon wrongful prosecution would do well to abandon state tort nomenclature altogether. The inquiry simply should be whether or not the prosecution complained of was wrongful under section 1983. Assuming that a plaintiff can show a deprivation of sufficient constitutional magnitude effected under color of state law, the only remaining issue concerns the presence or absence of due process. Since procedural due process will necessarily have been afforded most of these plaintiffs through their acquittals, courts need only ascertain whether or not a given plaintiff was denied substantive due process.[4]

A substantive due process analysis should focus upon the conduct of the defendant.[5] Only where the complained

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[3] *See* W. Prosser and W. Keeton, *Law of Torts* 871 (5th ed. 1984).

[4] It should also be noted that plaintiffs entitled to recovery in state court for the tort of malicious prosecution are provided all the process that they are due via a state post-deprivation tort remedy. *See Parratt v. Taylor*, 451 U.S. 527 (1981).

[5] At least two courts of appeal have evaluated section 1983 wrongful prosecution cases utilizing some type of substantive due process analysis. *Barnier v. Szentmiklosi*, 810 F.2d 594, 599 (6th Cir. 1987); *Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986). *See also* S. Nahmod, *Civil Rights and Civil Liberties Litigation* 156 (2d ed. 1986).

of conduct was so onerous as to shock the conscience would a denial of substantive due process occur. *See Rochin v. People of California*, 342 U.S. 165, 172 (1952).

II. THIS COURT SHOULD REVIEW AND REVERSE THE FINDING OF THE COURT BELOW THAT SECTION 1983 LIABILITY EXISTS IN THE PRESENT CASE.

As have many other appellate courts, the court below began its section 1983 inquiry by discussing malicious prosecution and stopped short in its analysis of due process. Maxwell argued for reversal of the section 1983 claim on the grounds that Respondents did not suffer a deprivation of sufficient constitutional magnitude and that Respondents did not suffer a denial of due process.

Respondents were in custody only at the time of their arrests and were released on personal recognizance bonds after a few hours of incarceration. The jury found that probable cause existed at time of arrest and exonerated all defendants of any liability for false arrest. Even though the Respondents remained free throughout their prosecution and were provided with counsel by the state, the Fourth Circuit reasoned that the prosecutions had interfered with Respondents' liberty. 885 F.2d at 163.

Yet even assuming for the sake of argument that a sufficient constitutional deprivation exists in the present case, the opinion below must be reversed since Respondents clearly received due process. Respondents received procedural due process in that they were acquitted.[6] The only remaining question should be whether Maxwell's conduct shocks the conscience. The Fourth Circuit in effect answered that question negatively by holding that Respondents failed to prove at time of trial that Maxwell had acted either intentionally or recklessly.

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[6] An adequate state post-deprivation tort remedy was also provided Respondents in the form of a verdict in their favor for malicious prosecution.

First, the court below noted that under South Carolina law, malice could be implied in a prosecution merely by showing the prosecution occurred without probable cause. The court observed that the record in this case was devoid of evidence of actual malice sufficient to sustain the verdict for punitive damages. The court explained:

> [P]roof of actual malice sufficient to sustain a verdict for punitive damages requires assessment of the officer's subjective intent—whether he had an evil motive or acted with ill will, intending wantonly to injure the plaintiff, or the recklessness of his actions manifested a conscious disregard of the rights of the plaintiff. Only if at least one of these factors is present is a punitive award justified.

885 F.2d at 166. The Court could find no proof in the record that Petitioner had acted with ill will. Second, the Court also noted that the jury exonerated Maxwell from liability for the tort of intentional infliction of emotional distress, thereby rejecting Respondents' argument that Maxwell had withheld exculpatory information as a result of personal animosity Maxwell had for Respondents' attorney. 885 F.2d at 166.

Thus, Maxwell's conduct could hardly be described as that which shocks the conscience. The section 1983 verdict against Maxwell cannot stand when reviewed under the appropriate constitutional scrutiny.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Fourth Circuit to consider the issues raised in this Petition.

Respectfully submitted,

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February 23, 1990

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2135

JAMES KENNETH GOODWIN; EDDIE EARL HALLMAN,
Plaintiffs-Appellees

v.

JAMES R. METTS, individually and in his official capacity as Sheriff of Lexington County, South Carolina; VERNON O. MAXWELL, individually and in his official capacity as a Lexington County Deputy Sheriff,
Defendants-Appellants

and

RALPH BISHOP, individually and d/b/a
Bishop Salvage Company,
Defendant

Appeal from the United States District Court
for the District of South Carolina, at Columbia
Karen L. Henderson, District Judge—(CA-86-996)

Argued: April 13, 1989 Decided: September 12, 1989

Before RUSSELL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Harold Weinberg Jacobs (David B. Summer, Jr., NEXSEN, PRUET, JACOBS & POLLARD on brief) for Appellants. Lex A. Rogerson, Jr. (John R. Delgado, FURR & DELGATO; Herbert W. Louthian, LOUTHIAN & LOUTHIAN; Armand Derfner, ARMAND DERFNER, P.A. on brief) for Appellees.

BUTZNER, Senior Circuit Judge:

After a jury trial, Vernon O. Maxwell was held liable for wrongful prosecution under 42 U.S.C. § 1983. The jury found Maxwell and James R. Metts liable for common law malicious prosecution. It awarded compensatory damages to plaintiffs, James Kenneth Goodwin and Eddie Earl Hallman, and assessed punitive damages against Maxwell. Metts and Maxwell appeal from the district court's denial of their motions for judgment notwithstanding the verdict and for a new trial. We set aside the verdict for punitive damages because the evidence does not justify it. We otherwise affirm the judgment of the district court.

I

Goodwin and Hallman were arrested by Lexington County, South Carolina, sheriff's deputies in connection with a break-in that occurred on the weekend of April 29, 1983, at the house of their employer Ralph Bishop. They were charged with grand larceny. Maxwell was the investigating officer in the case.

Between arraignment and trial, two discoveries cast doubt on whether there continued to be probable cause to believe that Goodwin and Hallman actually had committed the break-in. The warrant under which Goodwin and Hallman had been arrested was issued largely because of a statement given by a "Terry Nelson," which was the principal evidence directly linking them to the break-in. Sheriff's deputies discovered, however, that

"Nelson" had provided them with a false name and address, and they were unable to locate him. More importantly, about one month before Goodwin's and Hallman's trial, Michael Stafford was arrested in a neighboring jurisdiction and confessed to a series of break-ins at Bishop's house. Maxwell prepared a report on the Bishop break-ins, including the one of which Goodwin and Hallman were accused, indicating that all of the break-ins had been "cleared" by Stafford's confession. He added Stafford's name as a suspect to an incident report concerning the break-in for which Goodwin and Hallman were about to stand trial. Maxwell did not, however, inform anyone in the sheriff's department or county solicitor's office that he had connected Stafford with the Bishop break-in.

Even without knowing of Stafford's confession, the county solicitor was reluctant to permit the case against Goodwin and Hallman to proceed to trial, due to its perceived weakness. He declined to permit any member of his office to prosecute the case. Instead, a lawyer who had represented Bishop in civil matters prosecuted the case. He did so after conferring with Maxwell, who did not mention that Stafford had confessed to the break-in for which Goodwin and Hallman were charged. Maxwell did not disclose that he had cleared the records of the Goodwin-Hallman case by attributing the break-in to Stafford only two weeks earlier. After a jury trial in state court, Goodwin and Hallman were acquitted.

Goodwin and Hallman then brought this action, asserting various state and federal claims against Maxwell; John T. Vaughn, Maxwell's partner; Metts, the Lexington County sheriff; and Bishop. The district court directed a verdict in favor of Vaughn and submitted to the jury four claims against Maxwell, Metts, and Bishop.

The claims submitted to the jury alleged that the defendants were liable to Goodwin and Hallman for wrongful arrest and wrongful prosecution in violation of 42

U.S.C. § 1983 and for the pendent state law torts of malicious prosecution and intentional infliction of emotional distress. The jury found in favor of Bishop on all claims and in favor of Maxwell and Metts on the wrongful arrest and emotional distress claims. It held Maxwell and Metts liable for malicious prosecution and held Maxwell liable for wrongful prosecution under section 1983.[1] It awarded $60,000 compensatory damages to Goodwin, $90,000 compensatory damages to Hallman, and imposed $175,000 punitive damages against Maxwell.

II

Maxwell and Metts contend that they are entitled to judgment notwithstanding the verdict on the malicious prosecution claim and that Maxwell is entitled to judg-

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[1] Under South Carolina law, the elements of the tort of malicious prosecution are "(1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." Eaves v. Broad River Elec. Coop., 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982). For the purpose of establishing the elements of malicious prosecution, malice may be inferred from lack of probable cause. *See* Parrott v. Plowden Motor Co., 246 S.C. 318, 322, 143 S.E.2d 607, 609 (1965).

Essentially, the section 1983 claim consists of malicious prosecution resulting in a constitutional deprivation. *Cf.* Baker v. McCollan, 443 U.S. 137, 142 (1979).

Under section 1983, damages may not be awarded against a municipality or its supervisory officers solely on a theory of respondeat superior. *See* Monell v. Department of Social Serv., 436 U.S. 658, 694 (1978). Therefore the fact that the jury held against Metts on the state law claim but in his favor on the section 1983 claim indicates, as the district court concluded, that the basis of Mett's liability is the South Carolina sheriff's statute, S.C. Code Ann. § 23-13-10 (Law. Co-op. 1989), on which the jury was charged. This statute holds a sheriff strictly liable for the tortious conduct of his deputies. Metts asserts no claims of error other than those assigned by Maxwell, so our references to Maxwell's challenge to the state law verdict necessarily encompass Metts's challenge as well.

ment on the section 1983 claim. They argue that Maxwell's knowledge of Stafford's confession and the false identity and unavailability of the witness "Nelson" did not negate probable cause to believe that Goodwin and Hallman committed the Bishop break-in. Maxwell maintains that Stafford's confession did not exculpate Goodwin and Hallman. He characterizes the problem with "Nelson's" statement as one merely of witness unavailability, for which he cannot be held responsible. Maxwell asserts that the details of Stafford's confession were so dissimilar to the break-in of which Goodwin and Hallman were accused that he still had probable cause to believe in their guilt even after he heard of Stafford's statement, especially in view of his conclusion that the first Bishop break-in was an "inside job."

In reviewing the denial of a motion for judgment notwithstanding the verdict, we assess "the evidence and all reasonable inferences from it . . . in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed." Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 160 (4th Cir. 1988). If there is "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party," the jury verdict should be sustained. Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980).

There was substantial testimony that, before the trial of Goodwin and Hallman, Maxwell knew that the putative witness "Nelson" had provided a false name and address and could not be located. Moreover, it was reasonable for the jury to find that, based upon Stafford's confession, Maxwell knew or should have known, by the time of the criminal trial, that Goodwin and Hallman did not commit the break-in. Maxwell's insistence that Stafford's confession did not exculpate Goodwin and Hallman was rejected by the jury based upon substantial evidence. A

police officer who initially investigated the crime reported that the criminal had forcibly entered Bishop's house. This was contrary to Maxwell's theory of an inside job but consistent with Stafford's confession. Stafford broke into the house three or four times, but only in the first break-in did he steal a number of checks which he later burned. He was corroborated by the fact that the checks never were presented for payment. At no other time were checks stolen from Bishop's house. The first break-in when the checks were stolen, to which Stafford confessed, is the same crime Maxwell attributed to Goodwin and Hallman. Significantly, Maxwell's assertion is also belied by the fact that he cleared the record of the break-in, indicating Stafford's culpability, after learning of the confession.

Maxwell essentially seeks to retry on appeal the jury's factual determinations. But this court "is not free to . . . substitute its judgment of the facts for that of the jury." Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110, 113 (3d Cir. 1987). We will disturb the jury's verdict "'only if, as a matter of law, the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief.'" 816 F.2d at 113. Viewed in the light most favorable to Goodwin and Hallman, the evidence supports the jury's finding that Maxwell lacked probable cause to believe they were guilty after he learned of "Nelson's" false statements and the Stafford confession.

III

Maxwell and Metts contend they are entitled to judgment notwithstanding the verdict, even if there was no probable cause to prosecute Goodwin and Hallman. Maxwell lacked the power to discontinue the prosecution, they argue, and thus cannot be held liable for its continuation. As an investigating officer, Maxwell maintains, his duty extended only to an initial determination of probable cause and did not include any obligation to disclose ex-

culpatory information acquired after the initiation of criminal proceedings.

We cannot accept this argument. Under South Carolina law, liability for malicious prosecution arises from wrongful "institution *or continuation* of original judicial proceedings." *Eaves*, 277 S.C. at 477, 289 S.E.2d at 415 (emphasis added). Liability extends to anyone who "instituted a criminal action against plaintiff, or had caused one to be maintained or had voluntarily aided or assisted in its prosecution." Gibson v. Brown, 245 S.C. 547, 550, 141 S.E.2d 653, 654-55 (1965).

By his role in the investigation, Maxwell voluntarily assisted in the actionable continuation of the prosecution of Goodwin and Hallman. The evidence shows that the county solicitor was extremely reluctant to allow the case to go to trial, that Bishop's private lawyer decided to prosecute only after conferring with members of the sheriff's department, including Maxwell, and that Maxwell did not disclose the exculpatory information to the private prosecutor. The private prosecutor testified that, had the personnel in the sheriff's department said it was not "a winnable case," he would have told the solicitor, "and I am quite sure he would have nol prossed the case." The jury reasonably could infer that, had the private prosecutor been told of the facts negating probable cause, he would have declined to prosecute, and the solicitor would have nol prossed the case.

In South Carolina, only the solicitor can nol pros a case.[2] Maxwell lacked authority to terminate the prose-

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[2] The district court explained this rule of South Carolina law in its instruction to the jury. To emphasize the point, the court made it the subject of its first charge:

> I charge you that under South Carolina law, after indictment and before a jury is impaneled and sworn in a criminal case, the power to nol pros the case, that is, the power to put an end to the prosecution and prevent the case from going to trial is within the sole discretion of the solicitor.

cution. Nevertheless, he could be found liable for continuation of the prosecution if the deliberations of the private prosecutor "were in some way tainted by [his] actions." Hand v. Gary, 838 F.2d 1420, 1428 (5th Cir. 1988). A police officer who withholds exculpatory information from the prosecutor can be liable under both section 1983 and the state common law. The issue is causation. Maxwell contends that he did not cause the prosecution to continue because only the solicitor had the power either to go forward with the case or terminate it.

In Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988), police officers who withheld exculpatory evidence made the same argument Maxwell presses. In a carefully reasoned opinion, Judge Posner, writing for the court, rejected this argument, explaining:

> In constitutional-tort cases as in other cases, "a man [is] responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961). This principle led the Supreme Court in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345, 106 S.Ct. at 1098 (footnote omitted). The Court was speaking of immunity but its discussion is equally relevant to causation, as indeed is implied in a footnote to the Court's opinion. See *id.* at 344 n.7, 106 S.Ct. at 1098 n.7. By parallel reasoning, a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately

> supplied misleading information that influenced the decision.
>
> It is true that at some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause (and after conviction to the Eighth Amendment's cruel and unusual punishments clause, but that is not relevant here). But the causal inquiry is unchanged. If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him.

Jones, 856 F.2d at 993 (citations omitted); *accord* Lusby v. T. G. & Y. Stores, Inc., 749 F.2d 1423, 1431 (10th Cir. 1984), *vacated on other grounds*, 474 U.S. 805 (1985); Wheeler v. Cosden Oil & Chem. Co., 734 F.2d 254, 260 (5th Cir.), *modified on denial of reh'g*, 744 F.2d 1131 (5th Cir. 1984).

In Clarke v. Montgomery Ward & Co., 298 F.2d 346, 348 (4th Cir. 1962), this court said:

> A person who places before a prosecuting officer information upon which criminal proceedings are begun, and who later acquires additional information casting doubt upon the accused's guilt, should be under an obligation to disclose his discovery to the prosecutor. It should be no defense that the accuser acted in good faith in initiating the prosecution, if he remains silent and allows it to go on when he later learns that he was in error.

298 F.2d at 348.

Maxwell cannot escape liability merely because he could not unilaterally have terminated the prosecution of Goodwin and Hallmen. A jury reasonably could find that his

actions and omissions caused the two men unfairly to be subjected to a criminal trial.

IV

Maxwell raises claims of error with respect to the section 1983 claim, on which he alone was found liable. He contends that he is entitled to judgment notwithstanding the verdict because Goodwin and Hallman suffered no injury of constitutional magnitude as a result of being prosecuted. Goodwin and Hallman were not incarcerated during the pendency of the criminal charges but were freed on bond immediately after booking and remained free throughout the grand jury proceedings and trial. Maxwell asserts that they suffered no liberty or due process deprivation cognizable under section 1983. He argues that Baker v. McCollan, 443 U.S. 137 (1979), and Cramer v. Crutchfield, 648 F.2d 943 (4th Cir. 1981) (per curiam), establish that injuries of the kind suffered by Goodwin and Hallman cannot be grounds for a section 1983 claim.

Maxwell's argument cannot withstand analysis. In *Cramer*, we held that a plaintiff proceeding under section 1983 must allege a constitutional deprivation, but we did not exclude the possibility that a wrongful prosecution might give rise to a section 1983 claim, nor did we analyze the circumstances in which it would. *See* 648 F.2d at 945-46. In *Baker*, to be sure, the plaintiff had been negligently jailed for several days, pursuant to a facially valid warrant, due to mistaken identity, and the Supreme Court held that he was not thereby deprived of due process of law. *See* 443 U.S. at 141-46. The conclusion does not follow, however, that because they were not incarcerated, Goodwin and Hallman could not have been denied due process. Unlike the plaintiff in *Baker*, they were subjected to trial on serious criminal charges, and faced the possibility, if convicted, of lengthy periods of incarceration, with the attendant uncertainties and anx-

ieties suggested by that prospect. They suffered this injury because of Maxwell's failure to disclose exculpatory information to the solicitor or the private prosecutor.

Whether a criminal defendant is incarcerated is not decisive in determining if he has suffered an abridgment of constitutional rights. Being subjected to a prosecution because an officer withheld exculpatory evidence from the prosecutor while urging that the prosecution should go forward can work a constitutional deprivation. As the Third Circuit has held in an analogous situation,

> [a]n abuse of process is by definition a denial of procedural due process. . . . The injuries allegedly caused by defendants' actions include the deprivation of liberty concomitant to arrest and to the pendency of a criminal process, whether the plaintiff was in jail, released on bail, or released on his own recognizance. Such deprivations without due process state an injury actionable under section 1983.

Jennings v. Shuman, 567 F.2d 1213, 1220 (3d Cir. 1977). *See also* United States v. Marion, 404 U.S. 307, 320 (1971); Klopfer v. North Carolina, 386 U.S. 213, 221-22 (1967); Shaw v. Garrison, 467 F.2d 113, 120-22 (5th Cir. 1972).

In *Marion*, the Supreme Court explained the injurious consequences of a wrongful arrest; the same reasoning applies to a wrongful prosecution. Like an arrest, a prosecution is "a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Marion*, 404 U.S. at 320. The injuries proved by Goodwin and Hallman are of constitutional magnitude.

V

Maxwell also argues that he is entitled to qualified immunity on the section 1983 claim. He asserts that the district court erroneously failed to make an independent assessment of the reasonableness of his conduct and instead relied solely on the jury's determination that he lacked probable cause to seek continuation of the prosecution.

"[T]he test for qualified immunity for executive officers is one of 'objective legal reasonableness'—whether an official acting under the circumstances at issue reasonably could have believed that his action did not violate the constitutional rights asserted." Sevigny v. Dicksey, 846 F.2d 953, 956 (4th Cir. 1988) (citation omitted). "The contours of the right [violated by the officer] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). In *Sevigny*, we explained that, where the jury has determined that the officer lacked probable cause, he "might still be entitled to immunity if, on an objective assessment of the circumstances, an officer situated as was he reasonably could have believed there was probable cause . . . ." 846 F.2d at 956.

Contrary to Maxwell's assertion, the district court considered his qualified immunity claim under correct principles of law and properly rejected it. A reasonable officer would have known that "Nelson's" statement was of dubious value and that Stafford's confession was at least potentially exculpatory. He would have realized that both public and private prosecutors would have been disinclined to pursue the case against Goodwin and Hallman had they known that Maxwell had recorded that Stafford's confession cleared the crime with which the two men were charged. A reasonable officer would have known that a prosecution carried out without probable cause or disclosure of exculpatory information would vio-

late the constitutional rights of the criminal defendants. An officer cannot invoke qualified immunity where he "did not avail himself of readily available information that would have clarified matters to the point that [the crimninal charges] would have been flatly ruled out as factually unsupportable." *Sevigny*, 846 F.2d at 957-58.

By permitting the prosecution of Goodwin and Hallman to proceed after clearing the case file with Stafford's confession, Maxwell was acting on mutually inconsistent factual theories. A reasonable officer would have known that this made the existence of probable cause unlikely. *See Sevigny*, 846 F.2d at 957. Maxwell's conduct was objectively unreasonable and cannot be shielded by qualified immunity.

VI

Maxwell and Metts argue that they are entitled to a new trial on the question of compensatory damages. They claim that the jury was influenced by improper and prejudicial argument and that the compensatory damage verdict is excessive as a matter of law. They also suggest that they were prejudiced by argument pertaining to income lost by Goodwin and Hallman due to leaving Bishop's employ, because the district court failed to give a special jury instruction on this point.

Counsel for Goodwin and Hallman does not dispute that he referred briefly to lost wages evidence during his summation. But we do not perceive that Maxwell and Metts thereby were prejudiced. The district court carefully instructed the jury that it could award against each defendant only those damages proximately caused by that particular defendant's misconduct. This instruction was adequate to guard against any possible prejudice to Maxwell and Metts and any confusion remaining on the part of the jury. *See* Simmons v. Avisco, Local 713, 350 F.2d 1012, 1018-19 (4th Cir. 1965).

Maxwell and Metts also contend that the compensatory damage award was excessive because it was disproportionate to the out-of-pocket losses shown by Goodwin and Hallman. They note that the plaintiffs proved only about $3,500 in out-of-pocket expenses.

The question of the propriety of a jury's damage award is committed to the discretion of the district court. *See Sevigny*, 846 F.2d at 959. "Essentially, on appeal, we ask only whether the verdict is so 'untoward, inordinate, unreasonable or outrageous' as to be a denial of justice to allow it to stand." 846 F.2d at 959.

We will not disturb the district court's discretionary ruling merely because the compensatory award considerably exceeded Goodwin's and Hallman's out-of-pocket losses. *See Sevigny*, 846 F.2d at 959. In *Sevigny*, we declined to set aside a $112,000 compensatory damage award in a section 1983 false arrest action, despite the fact that the plaintiff "only proved $3680 in special damages." 846 F.2d at 959. Here, as in *Sevigny*, "[t]here was . . . substantial evidence . . . from which the jury could, and presumably did, find that [the plaintiffs] suffered extreme emotional distress," and were entitled to significant compensation for their injuries. *Sevigny*, 846 F.2d at 959. The district court did not abuse its discretion in sustaining the compensatory damages verdict.

VII

Maxwell also contends that the punitive damages verdict should be set aside.

The Supreme Court recently reiterated the principles governing the application of state and federal law to the issue of punitive damages:

> In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

> Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals.

Browning-Ferris Indus. v. Kelco Disposal, Inc., 57 U.S.L.W. 4985, 4991 (U.S. June 26, 1989) (footnotes and citations omitted). South Carolina authorizes an award of punitive damages when a plaintiff "proves the wanton, willful or malicious violation of his rights." Gilbert v. Duke Power Co., 255 S.C. 495, 500, 179 S.E.2d 720, 723 (1971). Punitive damages are available in section 1983 actions only "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983).

Maxwell contends that the punitive damage award is not supported by evidence sufficient to satisfy the requirements of federal or South Carolina law. Goodwin and Hallman counter by arguing that the malicious prosecution verdict shows Maxwell acted with malice. By holding Maxwell liable for malicious prosecution, they contend, the jury necessarily found that he had acted with malice, as malice is an element of the tort of malicious prosecution. Because Maxwell was shown to have acted with malice, and proof of malice justifies punitive damages, they insist that "without more" they are entitled to the award. Brief at 45.

Goodwin and Hallman, however, overlook South Carolina's distinction between the degree of malice that must be shown in order to establish a claim of which malice is an element and the showing of malice required to sustain punitive damages. South Carolina courts take the view that there are two kinds of malice, "implied malice or malice in law, and actual malice or malice in fact." Jones v. Garner, 250 S.C. 479, 488, 158 S.E.2d 909, 913 (1968). " 'Malice in law, or legal malice, is a presumption of law . . . .' " 250 S.C. at 488, 158 S.E.2d at 913.

It arises when a jury is permitted to infer malice from other facts and suffices to show malice in actions in which malice is a requisite element. *See* 250 S.C. at 488, 158 S.E.2d at 914. In contrast, "[a]ctual malice or malice in fact is not presumed and must be proved. Actual malice means that the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or [acted] with such recklessness as to show a conscious indifference toward plaintiff's rights." 250 S.C. at 488, 158 S.E.2d at 914.

This distinction between implied and actual malice is significant because of South Carolina's rule that "[w]hile implied malice will support an award of actual damages, punitive damages cannot be recovered in the absence of proof of actual malice." *Jones*, 250 S.C. at 488, 158 S.E.2d at 914. Although this rule was developed in the South Carolina law of libel and defamation, we are confident that South Carolina courts would follow the reasoning of other courts that have required proof of actual malice to justify an award of punitive damages for malicious prosecution.[3] Typical is the reasoning employed by the Supreme Court of Virginia:

> In a malicious prosecution action, it is proper to award punitive damages only when actual malice, or malice in fact, has been established by the evidence. Legal malice, which may be inferred from

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[3] *See, e.g.*, Proctor v. Stevens Employment Serv., Inc., 712 S.W.2d 684, 687 (Mo. 1986); Nevada Credit Rating Bureau, Inc. v. Williams, 88 Nev. 601, 503 P.2d 9, 14-15 (1972); Park v. Security Bank and Trust Co., 512 P.2d 113, 119 (Okla. 1973); Lee v. Southland Corp., 219 Va. 23, 244 S.E.2d 756, 759 (1978); AAA Employment, Inc. v. Weed, 457 So.2d 428, 431-32 (Ala. Civ. App. 1984); Jones v. Gwynne, 64 N.C. App. 51, 306 S.E.2d 574, 578 (1983) *aff'd in part and rev'd in part on other grounds*, 312 N.C. 393, 323 S.E.2d 9 (1984); *cf.* Shore, Shirley & Co. v. Kelley, 40 Ohio App. 3d 10, 531 N.E.2d 333, 339 (1988). *Contra*, Adams v. Whitfield, 290 So.2d 49, 51 (Fla. 1974); Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 340 A.2d 705, 709-10 (1975).

> want of probable cause, is not sufficient. Actual malice, or malice in fact, may be established by showing that the prosecutor's action was prompted by ill will, malevolence, grudge, spite, wicked intention, or conscious disregard of the rights of another.

Lee v. Southland Corp., 219 Va. 23, 244 S.E.2d 756, 759 (1978) (citation omitted).

It is particularly appropriate to apply the distinction between implied and actual malice to actions seeking punitive damages for malicious prosecution. As we have noted, South Carolina implies malice from a lack of probable cause. *See Parrott*, 246 S.C. at 322, 143 S.E.2d at 609. Whether a police officer acted without probable cause is determined by objectively examining his conduct. Conversely, proof of actual malice sufficient to sustain a verdict for punitive damages requires assessment of the officer's subjective intent—whether he had an evil motive or acted with ill will, intending wantonly to injure the plaintiff, or the recklessness of his actions manifested a conscious disregard of the rights of the plaintiff. Only if at least one of these factors is present is a punitive award justified.

The evidence disclosed that Maxwell disliked the attorney who defended Goodwin and Hallman in their state criminal trial. Maxwell admitted the animosity but asserted that it did not influence his conduct with respect to Goodwin and Hallman. Had the jury believed that Maxwell's animosity prompted the continuation of the prosecution, it would have been justified in awarding damages under South Carolina law for the intentional infliction of emotional distress. If a police officer allowed a grudge against an attorney to cause prosecution of the attorney's innocent clients, the officer's conduct would constitute the tort of intentional infliction of emotional distress which the South Carolina Supreme Court has described as conduct as "so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be

regarded as 'atrocious, and utterly intolerable in a civilized community.'" Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981). The jury, however, rejected the attack on Maxwell's motive and exonerated him from the tort of intentional infliction of emotional distress. This verdict and the lack of other evidence of actual malice establishes that the award of punitive damages cannot be sustained on the state law claim.

The requirements for proving punitive damages in an action brought under section 1983 are akin to actual malice as defined by the Supreme Court of South Carolina. *Compare Smith v. Wade*, 461 U.S. at 56, *with Gilbert v. Duke Power Co.*, 255 S.C. at 500, 179 S.E.2d at 723. The reasons that preclude punitive damages on the state law claim also bar a punitive award on the section 1983 claim.

The judgment of the district court awarding compensatory damages is sustained. The judgment awarding punitive damages is reversed, and the case is remanded for entry of judgment in accordance with this opinion.

The parties shall bear their own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No: 3:86-996-16

JAMES KENNETH GOODWIN and
EDDIE EARL HALLMAN,
Plaintiffs,

v.

JAMES R. METTS, individually and in his official capacity as Sheriff of Lexington County, South Carolina; VERNON O. MAXWELL, individually and in his official capacity as a Lexington County Deputy Sheriff; JOHN T. VAUGHN, individually and in his official capacity as a Lexington County Deputy Sheriff; and RALPH BISHOP, individually and d/b/a Bishop Salvage Company,
Defendants.

ORDER

[Filed June 27, 1988]

This matter is before the Court on several post-trial motions: (1) the motion of defendants James R. Metts and Vernon O. Maxwell for judgment notwithstanding the verdict or, in the alternative, for a new trial, (2) the motion of defendant Ralph Bishop for attorney's fees and costs, (3) the motion of defendant John T. Vaughn for costs and (4) the motion of the plaintiffs for attorney's fees and costs. For the reasons set forth below, the Court denies the motions for judgment n.o.v. or new trial by defendants Metts and Maxwell and for attorney's fees by defendant Bishop. The Court grants the motions for costs by defendants Bishop and Vaughn and for attorney's fees and costs by the plaintiffs but postpones de-

termination of the amount of fees and costs pending receipt of additional information from the parties.

The plaintiffs brought this action alleging various state and federal causes of action related to their arrest and prosecution on the charge of grand larceny. The plaintiffs were arrested by officers of the Lexington County, South Carolina, Sheriff's Department on connection with a break-in at their employer's house over the weekend of April 29, 1983. In January 1984, they were tried in state court on the charge of grand larceny and acquitted by a jury. They subsequently commenced this action for damages against the investigating officer, defendant Maxwell, his partner, defendant Vaughn, the Lexington County sheriff, defendant Metts, and the plaintiffs' former employer, Ralph Bishop. After a lengthy trial, the case was submitted to the jury against defendants Metts, Maxwell and Bishop on the following claims: (1) wrongful arrest in violation of Section 1983 of Title 42 of the United States Code, (2) wrongful prosecution in violation of Section 1983; (3) malicious prosecution and (4) outrage. The jury returned a verdict in favor of all defendants on the Section 1983 claim for wrongful arrest and on the outrage cause of action, but against defendant Maxwell on the section 1983 claim for wrongful prosecution and against defendants Metts and Maxwell on the malicious prosecution claim.[1] Accordingly, the jury

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[1] It is clear from the special verdict that the jury found defendant Metts liable for malicious prosecution solely on the basis of Section 23-13-10, Code of Laws of South Carolina, which makes all county sheriffs in South Carolina absolutely responsible for their deputies' misconduct. *See Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973); *Rutledge v. Small*, 192 S.C. 254, 6 S.E.2d 260 (1939).- The jury could not, consistent with the Court's instructions, find defendant Metts liable for malicious prosecution based on his own personal involvement without also finding him liable for wrongful prosecution in violation of Section 1983. On the other hand, the instructions did permit the jury to find defendant Metts vicariously liable on the former claim while absolving him of liability on the

awarded actual damages to plaintiff Goodwin in the amount of $60,000 and to plaintiff Hallman in the amount of $90,000. In addition, the jury assessed punitive damages of $175,000 against defendant Maxwell.

After the trial, defendants Metts and Maxwell moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. In addition, defendant Vaughn moved for costs and defendant Bishop and the plaintiffs moved for both attorney's fees and costs. The Court considers each motion separately.

I.

The Court first addresses defendants Metts and Maxwell's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. For the following reasons, the Court denies this motion.

A.

Defendants Metts and Maxwell assert several arguments in support of a judgment notwithstanding the verdict. On a motion for judgment n.o.v., the Court must consider the record as a whole and in the light most favorable to the party opposing the motion. If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motion should be denied. *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980). The Court concludes that, viewing the evidence in the light most favorable to the plaintiffs, the defendants' motion for judgment n.o.v. is opposed by substantial evidence supporting the jury's verdict.

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latter. The Court specifically instructed the jury that, while defendant Metts is vicariously liable for defendant Maxwell's violations of state law pursuant to Section 23-13-10, he is not vicariously liable for a violation of Section 1983.

First, the defendants assert that as a matter of law defendant Maxwell had probable cause to arrest and prosecute the plaintiffs at all times prior to the criminal trial because the jury found probable cause existed at the time of the arrest and no new evidence surfaced later that would negate that finding.[2] The Court agrees that if defendant Maxwell's state of knowledge had not changed between the arrest and the criminal trial, the jury could not have consistently returned a verdict in his favor as to the wrongful arrest claims and against him on the claims for the subsequent prosecution. Nevertheless, the Court concludes there is substantial evidence that, after the plaintiffs' arrest, defendant Maxwell discovered additional information concerning two aspects of the case which would have been sufficient to negate his earlier determination of probable cause.

First, the evidence supports a finding that prior to the criminal trial, defendant Maxwell had reason to question whether the strongest evidence pointing to the plaintiffs' guilt was reliable. At the time of the plaintiffs' arrest, probable cause was supported exclusively by defendant Maxwell's conclusion that the break-in was an "inside job" and by the statements of eye-witnesses Willie Nelson and Bobby Johnson. Nelson's statement, however, was the only evidence actually connecting the plaintiffs to the crime.[3] At the trial of this case, substantial testi-

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[2] The defendants do not challenge the verdict on the ground defendant Metts had probable cause to continue the prosecution of the plaintiffs. Because the jury found defendant Metts liable solely on the basis of Section 23-13-10, *see supra* note 1, the Court need not consider whether the evidence supports a finding of his personal involvement in the continued prosecution of the plaintiffs.

[3] Johnson's statement indicated only that on Friday or Saturday he saw the plaintiffs approaching Bishop's front porch and "blared the horn," at which plaintiff Goodwin turned around and waved to him. As it is undisputed that the plaintiffs met with Bishop in his trailer on Friday afternoon, this statement is hardly incriminating by itself. Nelson, however, stated that on Saturday, April 30, he

mony was offered that by the time of the criminal trial, defendant Maxwell had learned that Nelson could not be located, was not going to testify at trial and had provided a false name and address when he gave his statement. On the basis of this evidence, the jury could reasonably have concluded that Maxwell no longer had reason to rely on Nelson's statement and that probable cause no longer existed without that statement. Second, evidence was produced at trial from which the jury could have found that Maxwell should have known by the time of the criminal trial that another person committed the break-in with which the plaintiffs were charged. Maxwell admitted that before the trial he received a copy of a confession by one Michael Shawn Stafford in which Stafford admitted breaking into Bishop's trailer on three or four occasions. The jury could have found that a comparison of that confession with the incident report of the multiple break-ins at Bishop's trailer should have persuaded Maxwell that Stafford was guilty of the particular break-in with which the plaintiffs were charged.[4] In addition, Stafford provided testimony at trial from which the jury could have reasonably concluded that Stafford, rather than the plaintiffs, committed the break-in of which the plaintiffs were accused and that Maxwell could have learned this if he had interviewed Stafford prior to the

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saw plaintiff Hallman in Bishop's yard and defendant Goodwin on the front porch "as if he was coming out the front door" with "what looked to me a brown brief in his hands." Because the plaintiffs, according to the evidence, had no legitimate reason to be at Bishop's trailer on Saturday and because one of the items alleged to have been taken in the break-in was a brown bank bag, this statement is substantially more incriminating.

[4] Evidence was presented at trial that defendant Maxwell in fact initially cleared the plaintiffs on the basis of Stafford's confession. *See* Plaintiffs' Exh. No. 22 (Supplementary Report dated December 24, 1983).

criminal trial.[5] A finding that Maxwell knew or should have known either that Nelson's statement was unreliable or that Stafford committed the break-in is sufficient to support the conclusion that by the time of the criminal trial Maxwell lacked probable cause to believe that Goodwin and Hallman were guilty of the crime with which they were charged. Accordingly, the Court finds that there was substantial evidence to support finding defendant Maxwell lacked probable cause to continue prosecuting the plaintiffs.

Next, defendants Metts and Maxwell assert that Maxwell could not have "caused" the continued prosecution of the plaintiffs because in South Carolina only the solicitor has authority to terminate the prosecution prior to trial. The Court finds this reasoning unpersuasive. According to the evidence, the solicitor was not eager to prosecute the case against the plaintiffs. *See* Plaintiffs' Exh. 28 (Memorandum of Donald V. Myers to Sheriff James Metts dated January 11, 1984). It is a reasonable inference that, had he been apprised of the facts negating probable cause, he would have terminated the prosecution. In addition, the morning of the criminal trial, the solicitor placed the decision to prosecute in the hands of Jonathan Hendrix, a private lawyer who in fact prosecuted the plaintiffs. Hendrix testified that in order to reach a decision whether to bring the case to trial, he consulted with members of the Sheriff's Department, including defendant Maxwell. He further testified that, had they recommended against continuing, he would not have prosecuted the case. Although he was informed of the Stafford confession, he was told it was unconnected with the break-in with which the plaintiffs were charged. He was never told of the questions involving Nelson's

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[5] A police officer is charged with "possession of all the information reasonably discoverable by an officer acting reasonably under the circumstances." *See Scrigny v. Dicksey*, No. 87-3550, slip op. at 9 n. 5 (4th Cir. May 18, 1988) (to be reported at 846 F.2d 953).

whereabouts and identity. Because Hendrix decided to prosecute the case on the advice of members of the Sheriff's Department, including Maxwell (who did not disclose exculpatory information to Hendrix), the Court concludes the jury could infer that defendant Maxwell proximately caused the prosecution of the plaintiffs.

Next, defendants Metts and Maxwell assert the verdict cannot stand because defendant Maxwell enjoys qualified immunity for his conduct in the arrest and prosecution of the plaintiffs.[6] The test of qualified immunity is one of objective reasonableness; an official is immune from liability if under the circumstances he reasonably could have believed that his action did not violate the constitutional rights asserted. *Harlow v. Fitzgerald*, 457 U.S. 800, 819; *Sevigny v. Dicksey*, No. 87-3550, slip op. at 6 (4th Cir. May 18, 1988). More specifically here, the test is whether a police officer acting under the circumstances could reasonably have believed probable cause existed to continue prosecution of the plaintiffs. *See Anderson v. Creighton*, 97 L. Ed. 2d 523, 530-32 (1987); *Sevigny*, slip op. at 6. The qualified immunity inquiry focuses on the reasonableness of law enforcement officers' actions "in light of clearly established law and the information the . . . officers possessed." *Anderson*, 97 L. Ed. 2d at 532; *see also Harlow*, 457 U.S. at 818-19. The circumstances of the present case present no novel legal

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[6] The Court notes that the existence of this qualified immunity would not affect the verdict insofar as it is based on the state law claim for malicious prosecution. Under South Carolina law, a law enforcement officer enjoys immunity for conduct unless he is guilty of corruption or bad faith or was influenced by malicious motives. *Patel v. McIntyre*, 667 F. Supp. 1131, 1138-39 (D.S.C. 1987), *aff'd*, Nos. 87-1705 through 87-1708 (4th Cir. May 18, 1988); *Long v. Seabrook*, 260 S.C. 562, 568-69, 197 S.E.2d 659, 662. As a matter of law this immunity cannot shield a defendant from liability for the tort of malicious prosecution since malice is a necessary element of that tort. *See Margolis v. Telech*, 239 S.C. 232, 122 S.E.2d 417 (1961).

principles. Under the particular facts alleged by the plaintiffs and apparently found by the jury, the contours of the plaintiffs' right not to be prosecuted without probable cause were sufficiently clear that a reasonable officer would have understood that the defendants' actions violated that right. *See Anderson*, 97 L. Ed. 2d at 531. The existence *vel non* of probable cause to continue prosecuting the plaintiffs depended entirely on Maxwell's knowledge of Nelson's reliability and of Stafford's guilt. A reasonable officer could not believe he has probable cause under clearly established law if, as the jury apparently found, he knows or should know either that the only substantial evidence supporting probable cause is unreliable or that another individual actually committed the crime. Consequently, the Court concludes that if the jury found Maxwell lacked probable cause under the circumstances of this case, then his actions were not objectively reasonable as a matter of law and he is not entitled to qualified immunity.[7]

Next, defendants Metts and Maxwell make three arguments related to the capacities in which they were sued. This action was brought against the defendant law enforcement officers in both their individual and official capacities. At the close of the defendants' case, the Court granted a directed verdict in their favor on official capacity liability.[8] Defendants Metts and Maxwell now con-

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[7] The defendants argue that Maxwell is immune from liability because he was a reasonably competent officer and he thought probable cause existed to believe the plaintiffs committed the break-in. The Court rejects this reasoning. Because the "reasonable officer" standard is an objective one, the actual subjective beliefs of a particular officer are irrelevant. *Anderson*, 97 L. Ed. 2d at 532; *Sevigny*, slip op. at 12.

[8] The Court based its ruling on the ground that there is no entity which may be held liable for money damages on account of the policies promulgated or implemented by a county sheriff in South Carolina. A sheriff's policies cannot be attributed to the county because the county has no authority over the sheriff's de-

tend that neither of them may be held liable in their individual capacities for misconduct in the course of their official duties as sheriff and deputy.[9]

The Supreme Court has explained the distinction between individual, or personal, capacity suits and official capacity suits as follows: "Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law. . . . Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (quoting *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 690 n. 55 (1978)) (citations omitted). Thus, an official capacity suit is merely a means of joining a governmental entity as a defendant in order to impose liabilty on the entity rather than the individual defendant, while an individual or personal capacity suit seeks to hold the individual defendant liable and to recover from him individually. The distinction between individual and official capacity suits has nothing to do with whether the alleged misconduct occurred within the performance of the defendant's official duties. A defendant cannot ordinarily be sued under Section 1983 in either his individual or his official capacity unless he was acting on behalf of the state, or one of its political sub-

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partment. *See Patel v. McIntyre*, 667 F. Supp. 1131, 1146 n. 26 (D.S.C. 1987), *aff'd*, Nos. 87-1705 through 87-1708 (4th Cir. May 18, 1988); *see also McConnell v. Adams*, 829 F.2d 1319, 1326-28 (4th Cir. 1987), *cert. denied sub nom. Virginia ex rel. State Bd. of Elections v. Kilgore* and *Kilgore v. Virginia ex rel. State Bd. of Elections*, 108 S. Ct. 1731 (1988). The State of South Carolina cannot be held liable as the responsible entity because it is immune under the eleventh amendment from federal liability for money damages. *See id.*

[9] Defendant Maxwell also contends he cannot be held liable for punitive damages in his official capacity. As the verdict is against Maxwell only in his individual capacity, the Court need not address this contention.

divisions, as as to satisfy the "color of state law" requirement set forth in the statute. Consequently, defendants Metts and Maxwell may be held liable in their individual capacities for misconduct in the performance of their official duties.

Finally, defendant Maxwell asserts the punitive damage award is inconsistent with the jury's verdict on the outrage cause of action. Defendant Maxwell contends punitive damages could not be assesed without "some element of outrage" which cannot have been present because the jury found no liability on the state law claim for outrage. The Court, however, finds no inconsistency in the verdict. The tort of outrage requires a substantially different showing from that needed to recover punitive damages. On a Section 1983 claim, punitive damages may be awarded if a defendant's misconduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). On the state law claim for malicious prosecution, a plaintiff need only show that a defendant's actions were reckless, willful or wanton in order to recover punitive damages. *Camp v. Components, Inc.*, 285 S.C. 443, 330 S.E.2d 315 (Ct. App. 1985); *Fox v. Munnerlyn*, 283 S.C. 490, 323 S.E.2d 68 (Ct. App. 1984). To establish a claim for the tort of outrage, however, a plaintiff must meet a much higher standard and prove the defendant's conduct was "so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community." *Ford v. Hutson*, 276 S.C. 157, 163, 276 S.E.2d 776, 778 (1981) (quoting Restatement (Second) of Torts § 46 comment i (1965)). A plaintiff, therefore, may be entitled to recover punitive damages on either a Section 1983 or a state law claim even though he falls short of establishing the tort of outrage. Accordingly, the Court finds no inconsistency in the jury's verdict.

B.

Next, the Court considers the grounds raised by defendants Metts and Maxwell for a new trial.

First, defendants Metts and Maxwell assert the jury's verdict was against the weight of the evidence because there was no substantial evidence that defendant Maxwell's misconduct, if any, amounted to more than negligence and negligence is insufficient to support either a Section 1983 or a state law malicious prosecution claim. It is true that the Supreme Court has held that negligence is, at least in some circumstances, insufficient to support a Section 1983 claim. *See Daniels v. Williams*, 88 L. Ed. 2d 662 (1986); *Davidson v. Cannon*, 88 L. Ed. 2d 677 (1986). There was ample evidence at trial, however, to support a finding that defendant Maxwell acted recklessly in failing to act on the information received subsequent to the plaintiffs' arrest. On the state law claim for malicious prosecution, the only intent required is malice, which may be inferred from the absence of probable cause. *See Margolis v. Telech*, 239 S.C. 232, 122 S.E.2d 417 (1961). Since the Court has already ruled there was substantial evidence to support a determination that Maxwell lacked probable cause by the time of the criminal trial,[10] the Court concludes the plaintiffs made an adequate showing of malice.

Next, the defendants contend the Court's failure to instruct the jury on qualified immunity regarding the Section 1983 claim constitutes legal error. In light of this Court's holding that as a matter of law defendant Maxwell was not entitled to qualified immunity,[11] the Court finds no error in its failure to charge the jury on that defense.

Finally, the defendants contend the Court should grant a new trial *nisi remittitur* because the jury was not given

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[10] *See supra* pp. 4-7.

[11] *See supra* pp. 8-9.

a limiting instruction on actual damages and both the actual and punitive damages awarded are excessive as a matter of law. The defendants contend the Court should have instructed the jury on the amount of special medical damages and lost wages it could award. The Court saw no need to give the specific limiting instruction requested by the defendants. The Court was careful to instruct the jury that it could award against each defendant only those damages proximately caused by the particular defendant's misconduct. It was then for the jury to determine how much damage, if any, was proximately caused by the misconduct of each individual defendant. As to the amount of damages, the Court finds the award amply supported by the evidence at trial. Although there was little evidence of economic loss to either plaintiff, there was substantial testimony regarding emotional suffering both from the plaintiffs and from their expert witnesses. In light of that testimony and the fact that the plaintiffs were unnecessarily subjected to a week-long criminal trial and faced the prospect of imprisonment and separation from their families, the Court cannot say that actual damages in the amount of $60,000 for plaintiff Goodwin and $90,000 for plaintiff Hallman are so grossly excessive as to indicate they were actuated by passion, caprice or prejudice. *See Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville*, 285 S.C. 348, 329 S.E.2d 753 (1985); *Bonaparte v. Floyd*, 291 S.Ct. 427, 354 S.E.2d 40 (Ct. App. 1987); *cf. Sevigny*, slip op. at 14. Nor does the Court find the punitive damage award of $175,000 excessive. The circumstances to be considered in awarding punitive damages are the character of the wrong committed, the punishment that should be applied and the ability of the defendant to pay. *Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 314 S.E.2d 354 (Ct. App. 1984). Although there was little or no evidence of defendant Maxwell's financial condition, that is only one relevant factor and is not by itself determinative of the amount of punitive damages that may be awarded. *See*

Elders v. Parker, 286 S.C. 228, 332 S.E.2d 563 (Ct. App. 1985). In short, the Court does not find that the punitive damages are so excessive as to manifest passion, prejudice, caprice or corruption. *See id.* Accordingly, the Court declines to order a new trial *nisi remittitur*.

II.

Next the Court considers the motions for attorney's fees and costs.

Defendant Bishop moved for attorney's fees and costs pursuant to Section 1988 of Title 42 and Section 1920 of Title 28 of the United States Code on the ground that he is a "prevailing party" within the meaning of those statutes. The Court denies defendant Bishop's motion insofar as it seeks attorney's fees and defers awarding costs pending further documentation regarding deposition expenses.

Section 1988 provides in part: "In any action or proceeding to enforce a provision of [Section] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Under this statute, a prevailing defendant may recover attorney's fees only if the suit is "vexatious, frivolous, or brought to harrass or embarass the defendant." *Hensley v. Eckerhardt*, 461 U.S. 424, 460 n. 2 (1983); *see also Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). Defendant Bishop has not shown, and the Court does not find, that the instant lawsuit meets that standard. Accordingly, the Court denies defendant Bishop's motion as it relates to attorney's fees. Despite the unavailability of attorney's fees under Section 1988, defendant Bishop is nevertheless entitled to an award of costs under Section 1920. Defendant Bishop's counsel has submitted a statement of costs, to which the plaintiffs have objected in part. Specifically, the plaintiffs contest the claimed deposition expenses because defendant

Bishop has not expressly indicated that these costs fall into one of the categories allowable under Local Rule 28.08, D.S.C. The applicable portion of Local Rule 28.08 permits recovery of expenses for depositions which were either (1) "used at trial in lieu of live witness" or (2) "used during trial for impeachment purposes." As defendant Bishop has not indicated that the depositions for which he seeks reimbursement fall into either of these categories, the Court defers awarding him costs pending clarification of this issue.

Defendant Vaughn also moved for costs under section 1920. The plaintiffs do not challenge defendant Vaughn's entitlement to costs but do question the amount sought. Defendant Vaughn's counsel, who also represented defendants Metts and Maxwell in this action, has requested one-third of the total costs expended on behalf of all three law enforcement defendants. The Court agrees with the plaintiffs that this method of dividing costs is inappropriate. Defendant Vaughn is entitled to recover from the plaintiffs only those costs attributable to his presence in the lawsuit, that is, those which would not have been incurred had defendant Vaughn not been joined as a defendant. All other costs expended by his counsel are attributable to defendants Metts and Maxwell and, therefore, are not recoverable. The Court also notes that Vaughn's statement of costs, like Bishop's, contains substantial deposition expenses without any indication that those costs are recoverable under Local Rule 28.08. Accordingly, the Court instructs defendant Vaughn to submit an additional statement setting forth those costs attributable solely to his presence in the lawsuit and, if any deposition expenses are sought, explaining how those costs qualify for reimbursement under Local Rule 28.08.

Finally, the plaintiffs move for an award of attorney's fees and costs against defendants Metts and Maxwell pursuant to 42 U.S.C. § 1988. A prevailing plaintiff in a Section 1983 action " 'should ordinarily recover an attor-

ney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhardt*, 461 U.S. at 429 (quoting S. Rep. No. 94-1011 at 4 (1976)). Defendants Metts and Maxwell have offered no opposition to the plaintiffs' motion and the Court knows of no reason why it would be unjust to award the plaintiffs attorney's fees. In addition, the plaintiffs are also entitled to recover reasonable costs against defendants Metts and Maxwell. As the plaintiffs have not yet submitted all of their materials in support of the motion, however, the Court defers determination of the amount of attorney's fees and costs to which they are entitled.

For the reasons stated above, the Court denies defendants Metts and Maxwell's motions for judgment notwithstanding the verdict or for a new trial and defendant Bishop's motion for attorney's fees. The Court grants defendant Bishop's and defendant Vaughn's motions for costs and the plaintiffs' motion for attorney's fees and costs, but postpones determination of the amounts of these awards pending submission of further information by the parties. Defendant Bishop, defendant Vaughn and the plaintiffs are instructed to submit any additional material within seven days of the date of filing of this order.

IT IS SO ORDERED.

/s/ Karen LeCraft Henderson
KAREN LECRAFT HENDERSON
United States District Judge

Columbia, South Carolina
June 27, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:86-996-16

JAMES KENNETH GOODWIN and EDDIE EARL HALLMAN,
Plaintiffs,

-vs-

JAMES R. METTS, VERNON O. MAXWELL,
JOHN T. VAUGHN and RALPH BISHOP d b a
Bishop Salvage Company,
Defendants.

JUDGMENT

[Filed April 15, 1988]

This action came before the court and a jury, Honorable Karen LeCraft Henderson, United States District Judge, presiding and the issues having been duly tried and the jury having duly rendered its Verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, James Kenneth Goodwin, recover of the defendants, James R. Metts and Vernon O. Maxwell, the sum of Sixty Thousand and NO/100 ($60,000.00) Dollars, as actual damages.

IT IS FURTHER ORDERED that the plaintiff, Eddie Earl Hallman, recover of the defendants, James R. Metts and Vernon O. Maxwell, the sum of Ninety Thousand and NO/100 ($90,00.00) Dollars, as actual damages.

IT IS FURTHER ORDERED that the plaintiffs, James Kenneth Goodwin and Eddie Earl Hallman, recover of the defendant, Vernon O. Maxwell, the sum of

One Hundred Seventy Five Thousand and NO/100 ($175,000.00) Dollars, as punitive damages.

The prevailing parties shall recover their costs and Post-Judgment interest at the rate of 7.01%, as provided by law.

The court having heard and granted defendant, John T. Vaughn's motion for Directed Verdict, it is ordered and adjudged that the plaintiffs, James Kenneth Goodwin and Eddie Earl Hallman, take nothing as to this defendant, that the action be dismissed on the merits, and that the defendant, John T. Vaughn, recover of plaintiffs his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiffs James Kenneth Goodwin and Eddie Earl Hallman take nothing as to the defendant, Ralph Bishop, d/b/a Bishop Salvage Company, that the action be dismissed on the merits, and that the defendant, Ralph Bishop, d/b/a Bishop Salvage Company, recover of plaintiffs his costs of action.

ANN A. BIRCH
Clerk
United States District Court

By: /s/ Becky Wilson
BECKY WILSON
Deputy Clerk

APPROVED:

/s/ Karen LeCraft Henderson
KAREN LECRAFT HENDERSON
United States District Judge

April 15, 1988

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2135

JAMES KENNETH GOODWIN; EDDIE EARL HALLMAN,
Plaintiffs-Appellees

v.

JAMES R. METTS, individually and in his official capacity as Sheriff of Lexington County, South Carolina; VERNON O. MAXWELL, individually and in his official capacity as a Lexington County Deputy Sheriff,
Defendants-Appellants

and

RALPH BISHOP, individually and
d/b/a Bishop Salvage Company,
Defendant

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

[Filed Nov. 28, 1989]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Russell and Judge Chapman.

For the Court,

/s/ John M. Greacen
Clerk

STATUTORY PROVISIONS

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FILED
MAR 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1354

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

VERNON O. MAXWELL,
Petitioner,

v.

JAMES GOODWIN AND EDDIE HALLMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly uphold a jury verdict in favor of respondents on their claim that they were wrongfully prosecuted in violation of 42 U.S.C. § 1983?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

CONCLUSION 11

TABLE OF AUTHORITIES

Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985) 8

Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964) 8

Brady v. Maryland, 373 U.S. 83 (1963) . 8

City of Mesquite v. Aladdin's Castle, 455 U.S. 283 (1983) 6

Cline v. Brusett, 661 F.2d 108 (9th Cir. 1981) 8

Dunn v. Tennessee, 697 F.2d 121 (6th Cir. 1982), cert. denied 460 U.S. 1086 (1983) 6

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) 6

Haynesworth v. Miller, 820 F.2d 1245 (D.C.Cir. 1987) 7

Hirabayashi v. United States, 320 U.S. 81 (1943) 6

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) 8

Klopfer v. North Carolina, 386 U.S. 213 (1967) 7

Morrison v. Jones, 551 F.2d 939 (4th Cir. 1977) 9

Norton v. Liddell, 620 F.2d 1375 (10th Cir. 1980) 7

Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988) 7

United States v. Hastings, 296 U.S. 188 (1935) 5

Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254, on reh., 744 F.2d 1131 (5th Cir. 1984) 8

Younger v. Harris, 401 U.S. 50 (1971) . 7

STATEMENT OF THE CASE

Respondents sued petitioner (a deputy sheriff) and others on a number of counts, including malicious prosecution in violation of state law and wrongful prosecution without due process in violation of federal law. A jury awarded them compensatory damages against the petitioner totaling $150,000, bottomed on both the state law malicious prosecution claim[1] and the federal law wrongful prosecution claim.

The court of appeals (Russell, Chapman, and Butzner, JJ.) unanimously upheld the $150,000 compensatory damages verdict, although it set aside a punitive damages award of $175,000. Petitioner's rehearing petition was unanimously denied.

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[1] As to the state law claim, the damage award was entered jointly against petitioner and Sheriff James Metts, who is not a petitioner in this Court.

The petition for certiorari challenges the federal basis for the jury verdict but would not affect the judgment, since even if this Court were to set aside the verdict on the federal claim, the petitioner would still owe the $150,000 on the state law malicious prosecution claim.[2]

The case arose when respondents were arrested on a charge of larceny from their employer's house. Petitioner was the investigating officer. The arrest was based essentially on the statement of one alleged witness, "Terry Nelson."[3]

After the arrest, though, petitioner learned that "Nelson" had given a false name and address and could not be located. More important, another person, Michael Stafford, was arrested in a nearby city and

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[2] In fact, the judgment has already been paid.

[3] Another witness, Bobby Johnson, also provided a statement but his statement did not incriminate respondents.

confessed to a number of thefts including the crime with which respondents were charged.

When petitioner received Stafford's confession, he prepared and filed away reports "clearing" several crimes including the theft with which respondents had been charged. Petitioner did not bring the reports to anyone's attention or tell anyone else he had cleared the crime by Stafford's confession. Instead, he continued to maintain that respondents were the guilty parties.

Although the Solicitor (prosecutor) was unaware of the Stafford confession or of "Nelson's" unreliability, he believed the case against respondents was extremely weak or, as he put it, "100% trash." He refused to prosecute but, at the urging of the Sheriff's office, agreed to allow the

prosecution to go forward with a special prosecutor.[4]

Before agreeing to prosecute, the special prosecutor consulted with petitioner and other deputies and was assured that the case against respondents was meritorious and should be pursued. During the criminal trial the special prosecutor learned of Stafford's confession and asked petitioner about it, to which petitioner responded that the confession applied to other crimes but not this one.

The case thus proceeded to trial with petitioner, who was still concealing the exculpatory evidence, as one of the main prosecution witnesses. Following a week-long trial, the respondents were acquitted.

Later, after discovering Stafford's confession and other facts, respondents

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[4] The special prosecutor was the victim's personal attorney, who was told that he could prosecute the case or it would be nolle prossed.

brought this suit. The jury reached a verdict in respondents' favor on both state and federal claims, and that verdict was sustained by the district court on post-trial motions. When the court of appeals upheld the jury award as to compensatory damages this petition followed.

REASONS FOR DENYING THE WRIT

1. Because the judgment awarding the respondents $150,000 against the petitioner is based on a state claim as well as a federal claim, this Court's decision on the federal claim would not disturb the judgment. While that fact may not deprive this Court of jurisdiction, it does make review of the judgment "an anomaly." United States v. Hastings, 296 U.S. 188, 193 (1935). See also Hirabayashi v. United States, 320 U.S. 81 (1943); City

of Mesquite v. Aladdin's Castle, 455 U.S. 283, 292 (1983).

2. Apart from expressing some discomfort about the fact that the definitions of the state law and federal law claims have much in common, petitioner's complaints about the decision in this case are unclear. He very carefully refrains from saying there is a conflict in the circuits, because there is not. The cases cited in the Petition, pp. 5-6, show that wrongful criminal prosecution without due process is recognized as actionable under 42 U.S.C. § 1983 in virtually all of the circuits, and the standards governing such an action are similar from circuit to circuit.[5] The

[5] In addition to the cases cited in the Petition, see the following cases in other circuits: Dunn v. Tennessee, 697 F.2d 121, 125 (6th Cir. 1982), cert. denied 460 U.S. 1086 (1983); Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979); Norton v. Liddell, 620 F.2d 1375, 1378 (10th Cir. 1980); Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988); cf. Haynesworth v.

decision in this case, carefully considered by the district court and the court of appeals, is wholly consistent with the cases in other circuits. It is likewise consistent with this Court's acknowledgement of the constitutional interests involved in the pendency of serious criminal charges, e.g. Klopfer v. North Carolina, 386 U.S. 213 (1967), and of the affront to due process which a bad faith prosecution represents. Younger v. Harris, 401 U.S. 50 (1971).

3. Moreover, in addition to the general denial of due process involved in this prosecution, the petitioner committed a related but distinct violation of due process by concealing critical exculpatory evidence, both as to the Stafford confession and as to the phantom witness "Nelson." See Pet. App. 11a. Deliberate

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Miller, 820 F.2d 1245 (D.C.Cir. 1987) (Bivens action).

concealment of exculpatory evidence denies due process and renders a trial fundamentally unfair, to the point where any conviction that results must be reversed, Brady v. Maryland, 373 U.S. 83 (1963). By recognizing that such concealment of evidence may also support a federal claim for damages under § 1983, the court below was in accord with its own prior cases and with cases from other circuits.[6]

4. Ignoring all of this, the petitioner asserts that the fact that

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[6] Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), holds that withholding exculpatory evidence by police officers violates the same due process requirements which Brady imposes on prosecutors. This holding is consistent with § 1983 cases finding police officers liable for wrongful prosecution accomplished through concealment or fabrication of evidence. E.g., Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254, 260, on reh., 744 F.2d 1131 (5th Cir. 1984); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988); Cline v. Brusett, 661 F.2d 108 (9th Cir. 1981); Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985).

respondents were acquitted means they necessarily received the process they were due. Pet. 7, 8. This is wrong, because the mere fact that respondents achieved a correct result -- i.e., that they were found not guilty -- does not mean that the trial process was proper. In point of fact, the respondents were acquitted despite an unfair trial.

Petitioner's position would also mean that the cause of action for wrongful prosecution without due process could hardly exist. The courts have generally held that favorable termination of the underlying prosecution is a prerequisite for maintenance of the § 1983 action, e.g., Morrison v. Jones, 551 F.2d 939, 940 (4th Cir. 1977). Yet the petitioner would turn favorable termination into a defense.[7]

[7] Petitioner, no doubt aware of the contradiction, implies that perhaps a conviction should not bar an unhappy defendant from prevailing on this cause of action, Pet. 7, but this is hardly the case

Under this view, a policeman's conduct, no matter how egregious, would always be immunized from a wrongful prosecution claim if the prosecution ended in an acquittal.

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in which to begin such a wholesale rewriting of established principles of libility.

CONCLUSION

The Petitioner seeks to invite the Court into academic speculation about the due process clause, in a case where the judgment would not be affected. The Petition should be denied.

Respectfully submitted,

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